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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION, *et al.*,

Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

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INTERESTS OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST

The National Council of the Churches of Christ (the "Council") is a cooperative agency of thirty national religious bodies of the Protestant, Anglican and Eastern Orthodox traditions in the United States, numbering

over 40,000,000. The Council is organized for religious purposes. One of the means by which it promotes its purposes is to "Study, and to speak and to act on conditions and issues in the nation and the world which involve moral, ethical, and spiritual principles inherent in the Christian Gospel".

The Council believes that several aspects of the provision and termination of utility services, particularly for those most likely to be subject to such termination, involve moral, ethical and spiritual principles inherent in the Christian Gospel. The Council, accordingly, pursuant to its charter, deems it to be its duty "to speak and to act" before courts and other agencies considering and declaring the rules and guidelines applicable to such termination.

QUESTIONS PRESENTED

1. Whether the right, under state law, of a subscriber for water, gas and electricity service from a municipally owned utility company, to receive such service, is an interest protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the process followed by petitioners in terminating the utility to respondents meets the standards of procedural due process.

STATEMENT OF THE CASE

As our society, particularly our urban society, becomes more complex and interdependent, the ability of individuals and families

to secure their basic food, clothing and shelter moves more and more beyond their own capacities. The heat, light, water, plumbing and food storage that depend upon utility services are necessities in the strictest sense. Within hours of the termination of such service subscribers therefor and their families and children may be as helpless as an infant suddently cast outdoors on a frigid winter night. Details of the results of some of the more recent terminations of services are in a large number of Council files. A few examples appear below.

During the frigid winter of 1976-1977 the utter dependence upon utility service for life itself was demonstrated, in tragic fashion, to the Council and other public and private agencies concerned with the physical and spiritual welfare of those dependent upon such services. On January 11, 1977, according to an account in the January 12th issue of the Mansfield, Ohio News Journal, Eugene Kuhn, 74 years of age, "was found frozen in bed...after his electricity had been turned off for non-payment of bills". The bills which Mr. Kuhn owed aggregated $18.36, covering services for a period of two months. The coroner found that Mr. Kuhn died eight hours after the power cut-off.

Later during the same winter, the Public Utilities Commission of Ohio forebade gas utilities from discontinuing service for any reason. The order expired on March 31, and on the same day the Commission voted 2 to 1 not to extend the ban for another 30 days. An account of some of the results of the moratorium's end appeared in the April 7, 1977 issue of the Cleveland Plain Dealer, a copy of which

is appended to this brief. Procedures used by some Ohio utility companies terminating services in early April are described in an article in the April 6th issue of the Columbus Dispatch, a copy of which is likewise appended.

Two children died and their mother was critically burned in a Brooklyn fire, apparently caused by a candle, being used because the Consolidated Edison Company of New York had turned off power in their building in the belief that the house was vacant. The account of the children's death is in a New York Daily News article in the issue of May 12, 1977.

In the files of the Council is a copy of the Grand Jury Report of the Grand Jury of Schenectady County, New York, for the January 1974 term of the Supreme Court of New York State, Schenectady County. There follow excerpts from that report.

> "On December 24, 1973, Frank Baker and Katherine Baker, his wife, were discovered by their grandson, Basil Heise, to have perished in their home at 802 Arch Street in the City and County of Schenectady, New York. Frank Baker was 93 years old and his wife 92. They died from cardiac arrest precipitated by age and exposure. There was no central heating in their home as the gas furnace was de-activated when the Niagara Mohawk Power Corporation discontinued the electrical service on or about December 20, 1973. In connection with their death, there was no evidence of violence or foul play.

* * *

The Niagara Mohawk Power Corporation supplied both electricity and gas for heating and cooking to the Baker home for many years. The company had a security deposit of seventy dollars ($70.00), interest of $4.90 was credited to the Bakers account annually for this deposit. In the Spring of 1973, the Baker's bill with Niagara Mohawk began to accumulate until it reached a high of two hundred ninety-three dollars and forty-eight cents ($293.48) on May 23, 1973. On June 4, 1973, the electric power was discontinued and it was restored in August or early September 1973. The restoration of the power was the result of payments on the Baker's account. Apparently, Mr. Baker paid $100.00 and the St. Vincent DePaul Society of the St. Columba's Church paid $120.00 as arranged by Father Murphy.

The Baker's arrears on their bill rose to $208.83 in early December. On the 27th day of November, 1973, the required notice was mailed to the Bakers at their Arch Street address. This notice was found in the Baker home on December 24, 1973. The envelope in which the notice was mailed was opened. On December 13, 1973, the collectors for Niagara Mohawk visited the Bakers to determine the reason for non-payment and to collect on the account if possible. Mr. and Mrs. Baker were informed of the arrears and of the consequences of non-payment. Mr. Baker denied owing the bill, but Mrs. Baker was quoted as saying, 'I knew you would get into trouble.' It is not clear whether the Bakers really understood the nature of this bill or if they understood the consequences of a disconnection of power. On December 20, 1973, the power was disconnected by a lineman at the

pole outside of the Baker home. This resulted in the deactivation of their furnace and their home was without heat."

Finally, this Court is respectfully requested to consider two letters sent to a Community Action Council for the City of Schenectady, both of which are self explanatory. One of the letters is reproduced in a footnote below.* A copy of the second letter, with all of its self-evident grammatical errors, is appended hereto.

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* Dated April 25, 1977

Dear Mr. Dusenberry,

My name is Donna Carosella and I live at 1194 South Country Club Drive in Schenectady.

I am writing to inform you that on Thursday, April 14, 1977, while I was at work and no one was home at my house, Niagara Mohawk came to my home and turned my heat off without speaking to anyone at my home.

I have a five year old son who is always getting bronchitis and it was pretty cold that night.

I hope soon that something will be done about things like this happening to people.

Yours truly,

Mrs. Donna Carosella

(Spelling and grammar corrected)

ARGUMENTS

POINT I

THE TERMINATION OF UTILITY SERVICES BY A MUNICIPAL UTILITY IS GOVERNED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Fourteenth Amendment forbids any state to deprive "any person of life, liberty or property without due process of law". Petitioners (defendants below) are a municipally owned utility and some of its officers and employees. Their actions are state actions wthin the requirement of state action under the due process clause. Davis v. Weir, 497 F.2d 139, 143 (5th Cir. 1974).

Utility services such as those supplied to respondents by petitioners are basic to life, safety and health. As stated in Uhl v. Ness City, Kansas, 406 F.Supp. 1012 (D. Kan. 1975), an action in which residents of Ness City challenged local ordinances providing for termination of municipal water service upon non-payment of solid waste collection fees:

> "By threatening to deprive residents of water, an absolute necessity of life, in order to collect a service charge for other municipal functions, the defendant cities have chosen an effective and oppressive collection method. It is apparent to the Court that this means of enforcing an ordinance bears no reasonable relationship to its purpose, i.e., to protect the general welfare and improve the living conditions of city residents. Termination of all access to water would immediately threaten the health, life and well being of any resident of the

defendant cities." (Id. at 1018).**

The right to receive such services is also a right of property under applicable Tennessee state law. Crumley v. Watauga Water Co., 99 Tenn. 420, 41 S.W. 1058 (1897); Trigg v. Middle Tennessee Electric Membership Corp., 533 S.W. 2d 730, 733 (Tenn. App. 1975).

It is unnecessary to classify a utility subscriber's entitlement to utility services as a "right" or a "privilege". See, Morrissey v. Brewer, 408 U.S. 471 (1972); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232 (1957).

The loss of utility services may be "grievous", just as much or even more than the loss of employment or the loss of welfare benefits. See, Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S.123, 168 (1951) (Frankfurter, J., concurring); Goldberg v. Kelly, 397 U.S. 254, 263 (1970). The process

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**This action may be distinguished from Jackson v. Metropolitan Edison Company, 483 F. 2d 754 (3rd Cir. 1973), aff'd 419 U.S. 345 (1974), in which the Supreme Court rejected plaintiff's claims on the state action point. The Court of Appeals in the Third Circuit referred to electricity, "in today's urban society", as something which "does much to make life more comfortable and convenient...", the absence of which "in the usual situation does not pose an immediate threat to the life of the occupants". (Id. at 759-60). This action concerns the termination of water service, as well as electricity, and the deaths of the past frigid winter in Ohio and elsewhere would seem t be sufficient proof that electricity may be more than a comfort or a convenience.

used to deprive a person of the service must be "due process", the precise dictates of which depend upon the nature and extent of the interest.

POINT II

THE PROCEDURES ACCORDED RESPONDENTS BY PETITIONERS FALL SHORT OF THE PROCEDURAL DUE PROCESS MANDATED BY THE DUE PROCESS CLAUSE.

A. The General Principles of Procedural Due Process.

Procedural due process has been said by this Court to be "perhaps the least frozen concept in our law". Griffin v. Illinois, 351 U.S. 12, 20-21 (1956). (Frankfurter, J. concurring) More recently, in Mathews v. Eldridge, 424 U.S. 319 (1976), the court stated:

> "[D]ue process," unlike some legal rules is not a technical conception with a fixed content unrelated to time, place and circumstances... [D]ue process is flexible and calls for such procedural protections as the particular situation demands. 424 U.S. at 334. (citations omitted).

In Goldberg v. Kelly, supra, the Supreme Court held that procedural due process required an evidentiary type of hearing by the Department of Health, Education and Welfare before it might terminate welfare benefits. The elements of that hearing, as stated in Mathews, were:

"(1) 'timely and adequate notice detailing the reasons for a proposed termination'; (2) 'an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally'; (3)retained counsel, if desired; (4) an 'impartial decisionmaker'; (5) a decision resting 'solely on the legal rules and evidence adduced at the hearing'; (6) a statement of reasons for the decision and the evidence relied on." 424 U.S. at 325 n. 4. (Citing Goldberg v. Kelly, supra).

In Morrissey v. Brewer, supra, the Supreme Court, after concluding that due process necessitated a hearing prior to any revocation of parole, prescribed the procedures for a "pre-probable cause" type hearing, followed by a more formal evidentiary hearing, the "minimum requirements" of which were then stated in substantially the same manner as the Goldberg-Mathews statements.

Mathews v. Eldridge, supra, involved a challenge to administrative regulations of the Department of Health, Education and Welfare for the termination of benefits under the Social Security Law in cases of disputed disability. This Court set out as a guide "three distinct factors" to resolve the "kind of hearing" problem. After stating the flexibility of procedural due process, it held:

"Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected...More precisely, our prior decisions indicate that identification

of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 334-35. (citations omitted).

In the final analysis the test of due process is basic fairness, the concept of which incorporates "high social and moral values inherent in the procedural safeguard of a fair hearing..." Joint Anti-Fascist Refugee Committee v. McGrath, supra. "The high social and moral values inherent [in procedural due process]" are, of course, the values which the Council particularly seeks to have incorporated in the whole of our body of laws, substantive and procedural.

The Council respectfully submits, as particularly important in defining the process for the termination of utility services by a municipal utility, the fact that life itself may depend in some cases upon the provision of such services, that in many other cases the health and safety of children, the elderly, and other groups particularly requiring the protection of an ethically operating governmental machinery, depend upon such services.

B. The Procedures Followed by Petitioners Fall Short of The Constitutional Requirements.

The question of whether the petitioners' procedures meet or fall short of the constitutional tests of procedural due process can best be considered by discussion, seriatum, of the three distinct Mathews v. Eldridge factors, followed by application of the more general test of basic fairness.

1. The private interests involved.

The first of the Mathews factors is that of "the private interests that will be affected by the official action". In Mathews, that interest was the interest of a claimant of social security benefits.

The private interests affected can, of course, be measured in several different ways. Simplest but perhaps most unjust would be the monetary measure. To the subscriber, the termination of services may mean misery, illness or even death if the service is turned off. To the utility it is the loss of an infinitesimal fraction of its operating revenues.

Consideration must, of course, be accorded to the problems of the utility generally if it is denied in a large number of cases the remedy of termination without recourse to any legal process. Such termination is, however, a kind of self-help, used as a substitute for legal process, that is all but obsolete in a complex and highly industrialized society. Prejudice of two sorts may result from such exercise of self-help:

(a) The subscriber loses all opportunity to interpose any defense to the utility's claims for the amounts purportedly owed to it.

(b) In the event that there is no real defense, the sanction suffered by the subscriber, ranging from minor inconvenience to death, may be altogether out of proporton to the civil wrong of failure to pay the amount due.

Were the wrong inflicted by the subscribe upon the utility company a criminal wrong, the sanction suffered by the subscriber at the hand of the utility would, in many cases be a cruel and unusual punishment. A fortiori, procedural due process should be sufficiently fluid to prevent such punishment for the civil offense of failure to pay utility charges.

2. The results of the procedures used and the value of the additional safeguards.

The second Mathews factor is that of:

> "The risk of erroneous deprivation of [the private interest that will be affected by the official action] through the procedure used and the probable value, if any, of additional or substitute safeguards.

Little need be said about the first half of this second factor. The record proves that there was an erroneous deprivation of the Crafts' rights. After the removal of the extra meter they continued for two months to receive double computer billings (R. 9). The fact of the double billings was ascertained only after the Crafts went to Court. The computer failures were built into the system. The human judgmental factors were wiped out.

Respondents' due process claims are, in essence, claims for the interposition in the termination process of a human factor. The means of interposing that human factor is the observance of the traditional notice and hearing, which lie at the heart of procedural due process. A computer may listen; it does not hear. Petitioners' computers were programmed to send form notices of termination in the event that the amount the machine noted as due was not paid by the end of a day stated.

The Council submits that such dehumanization of the process by which the utility is supposed to make a rational and reasonably humane judgment of whether to turn off utility service is offensive to the basic concepts of fairness which are inherent in due process. It violates particularly the "high social and moral values inherent [in procedural due process]. Joint Anti-Fascist Refugee Committee v. McGrath, supra.

The Council does not state a position as to the details of the additional safeguards to be added to the petitioners' procedures. It concedes that not all of the elements of an adversary process are necessary. Fair notice and hearing which will prevent the unjust and sometimes tragic consequences of the nature described earlier in this brief are required. See, Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975).

3. The fiscal and administrative burdens of the additional safeguards.

The Council, as do respondents, believes that the specifics of the process which should be mandated should be determined upon remand of the action to the District Court. Those specifics should, of course, take due account of both 1) the administrative burdens upon the petitioners and other utility companies of the procedure considered; and 2) the costs and hazards to the subscriber avoided by the imposition upon the utility of such administrative burdens. The variety of procedures which would take reasonable account of both of these factors is clear from respondents' brief and the Appendix thereto.

In some cases those costs and hazards to subscribers, who may be wholly without fault or guilty of only minimal negligence, may be their very lives. Just as a basic principal of our criminal law is to place a greater importance on protection of the innocent from wrongful conviction than on certainty of conviction of all who have breached the laws, so should the avoidance of the wrongful imposition of unfair penalties upon utility subscribers guilty of no wrong or of only a slight civil offense be deemed paramount, as against the importance of collection of amounts due.

A second important factor in weighing the amount of the costs or the severity of the administrative burden cast upon the petitioners by additional safeguards in the preservation of some vestiges of humanness in the operation of the utility, which will be apparent to the subscribers. Even in the case of a private utility, and more so in the case of a municipal utility, to most of the subscribers who are concerned with possible termination of services, the Company is the State. It is the government, the set of institutions which they must respect and

obey.

The Council submits that the institutions of government, of which the law is one, must be just and seen to be just if government itself is to be respected. If the institutions of government are so computerized or otherwise dehumanized as to eliminate human judgment altogether, respect for the law and government suffers, and the basic fabric of society is weakened.

CONCLUSION

Termination of utility services by a municipal utility company is subject to procedural due process. Notice and a hearing, providing for the exercise of a human and humane judgment, are required under the applicable Supreme Court rulings. The procedures followed by petitioners herein violated the standards of those rulings. The matter of the specific procedures should be remanded to the District Court, under appropriate directions by this Court as to notice and a hearing.

Respectfully submitted,

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APPENDIX

THE PLAIN DEALER, THURSDAY, APRIL 7, 1977

* * *

500 Ohio families chilled by no-pay gas shutoffs

By the Associated Press

Natural gas shutoffs spread across the state yesterday, leaving at least 500 families without heat because they are behind in paying their gas bills.

The Public Utilities Commission of Ohio last week refused to extend the moratorium on gas company shutoffs beyond April 1.

Bulk of the shutoffs have been by the Cincinnati Gas & Electric Co., the West-Ohio Gas Co., which serves the Lima area, and the Clintonian Fuel & Oil Co. at Buckeye Lake.

A CG&E spokesman said the company since March 26 has visited more than 3,700 customers, each of whom owes the company at least $300. The company said customers who failed to make payment arrangements were disconnected.

On Jan. 26 PUCO issued an order making it illegal to shut off gas service for any reason until April 1. The order was to keep people hit by high bills from freezing to death. Temperatures were still below freezing across much of the state yesterday.

West Ohio Gas has shut off service to 40 customers as has Clintonian.

The state's other large gas companies reported no shutoffs and said they expect to make none until at least mid-April.

All utilities have been ordered by PUCO to advertise extended payment plans.

* * *

B-4 Columbus Dispatch Wed., April 6, 1977

Company Moves Fast On Ruling

By The Associated Press

The moratorium on gas service shutoffs ended at midnight April 1 and 15 minutes later a gas company worker was at Roy Dreyfus' door to take away his meter.

"It was a surprise, I'll tell you.

"THE DOG BARKED. I jumped out of bed and there he stood with his little helmet on his head and a wrench in his hand," Dreyfus recalled.

He owed the company $173. His last bill arrived only hours before the Clintonian Fuel and Oil Co. paid its call.

"That bill wasn't even due until April 10," Dreyfus complained Tuesday.

CLINTONIAN, A small gas company with 1,830 customers, shut off another 39 households that same morning in the central Ohio community of Buckeye Lake, said General Manager Harold Edgington.

Why so soon after midnight?

"It was April first," Edgington said.

ON THAT DAY a Public Utilities Commission of Ohio order prohibiting gas companies from shutting off service for any reason expired and the PUCO had refused before to extend the moratorium.

Chairman C. Luther Heckman had said he didn't think there would be any shutoffs until mid-April. Then, he said, the PUCO order for companies to advertise extended payment plans would allow everyone to eventually pay bills and not lose service.

Clintonian placed two advertisements in the Buckeye Lake Shopper, a local newspaper that winds up in post office boxes. There is no home mail delivery in the central Ohio community of 3,000.

ON MARCH 30, 35 hours before the shutoffs began, the paper was distributed and carried this advertisement:

"Notice to Clintonian Consumers:

"Unless sufficient arrangements are made on delinquent gas bills, service will be terminated April 1. Service will not be reinstated until bill is paid in full and deposit is uprated to $100. Any gas terminated for 30 days or more at any one location will be considered as permanent termination thus better enabling us to have a more adequate supply for our paying customers."

THE COMPANY confirms Dreyfus' charge that he received no notice of the impending loss of service in the mail, nor was he contacted in person or by telephone.

Dreyfus, who lives in the house with his wife and two sons, says he's cold.

"We've got an electric heating pad that my wife keeps on her chest," he said. "She's got emphysema and catchs colds very easily."

THE TEMPERATURE Tuesday night was to have dipped to below 20 and snow flurries were expected. Wednesday's temperature was not expected to warm much with highs predicted in the high 30s or low 40s.

What about cooking?

"Well, we have a gas stove so that's out. We're buying hamburgers and the like."

DREYFUS SAID he wants to pay, but hasn't got the $273 it would now cost him to have his meter reinstalled.

"I didn't know this was coming. The wife called the next morning (after the meter was removed) and offered to make payments. The PUCO was telling everybody that we could do that. But they said: 'There's only one way, you pay us what you owe us.'"

Edgington confirmed that it was company policy to require people like Dreyfus to pay it all now.

"WE GAVE THEM notice in the paper," he said.

Twelve customers who lost their meters that early morning have managed to pay the back bills plus the new $130 deposit.

DREYFUS, A maintenance superintendent at the Ohio Medical and Correctional Center in Columbus, said he got behind in January when he couldn't pay his January bill for $71. Ohio's coldest winter in history pushed the unpaid bill up to $173 by late March.

(Letter received by the Community Action Council for the City of Schenectady; typed, but otherwise uncorrected.)

My name is Phyllis Taylor I live at 2440 Ave. B ext Schenectady N.Y. I have three childrens and Iam on public assitance. This is how my story is and hard ships. A few times the walfar had to pay Nidgagara Mohawk bill because I didn't have the proper amount to pay it my alowence is $50.00 a month in the cold times of the year which my highlest bill was $168.00 I didn't even have half of it so I got so far in the root so I got sick to my stomach and hd to have help I mean help. I get $26.00 in the spring time. So a man came over from Nidgaria Mohawk one day in told me I owed $826.63 that the walfar payed $456.00 he said I had to go down and make some aragment on how I can pay my bill so I went down and talked with some one and I told him I just can possible pay my bill because the public assistance are taking from my budget $41.00 a month so that teares $9.00 left how can I possible pay a $79.00 bill or $168.00 I can't do that I am drive my self crazy that how I feel the man I am sorry I don't recall the man name but he made me feel like a snake in grass I all most cryed he told me it wouldn't let the man in to shut it off in my celler. I have 2 childrens who has chicken pos I told him so he left he said I would be hearing from him soon. So I went back to the walfar department and they told me that all they can payed $456.00. But my problems is by the time they take money from my check of 41.00 I have no money left to pay my bill for the next month bill. So it just keeps on getting worst and harder for me. Iam not proud that I an on assitance but thing happen I have no other way to support my childrens I am blind in one eye and barly

see out of my right eye. So that when I had to go see Fred M. Dusenbury of Schenectady Community Action Program 75 Lafayett Street. And he called nidgaria Mohawk and told them my situation I aso had $80.00 worth of meat in my freezer that all I had to last till the first of next month. I know deep down in my heart I can have light and gas for nothing but I can't pay my bill off I don't have the proper means to pay it off. So I would like a hearing on it. Thank you

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